April 11, 2013

The Honorable Kevin Cotter, Chair, House Committee on Judiciary
Members of the House Committee on Judiciary

Regarding SB 43 (Gratiot/Clinton Trial Courts)

For over 40 years as an employee of the Michigan House of Representatives, as a biennial experience, I covered proposals to increase or eliminate judgeships – including the legislation that resulted from the Supreme Court's Judicial Resources Report of 2011.

What is before the Committee today is a third option for reducing the number of trial judgeships – circuit, probate, and district – from 6 to 5 in the 29th Judicial Circuit (Clinton/Gratiot).

The original JRR 2011 made no recommendation as to which judgeships to eliminate in any circuit. But when SCAO prepared legislation to implement the JRR, it drafted HB 5108 to eliminate the district judgeship in Gratiot because there was about to be a vacancy in the probate court in that county and a merger of district court and probate court jurisdiction would have facilitated an immediate reduction – not because the statistics it relied upon for the JRR dictated or justified that option or because that reduction made the most sense.

When the Legislature ultimately passed HB 5105, 2011 PA 300, to provide for the elimination of a district judgeship in Clinton County, there was similarly no data that compelled that option either.

What is now being proposed – to eliminate a circuit judgeship in the 29th Circuit – is a more supportable option than either 2011 version. To my knowledge there was no testimony from anyone in either county in the House or Senate on the Gratiot/Clinton issue last Session – highly unusual given the history of local input or comment for decades when changes in judgeships have been proposed. I understand that there is local support for the proposed change, unlike the silence of last Session.

But here is the rest of the story.

The statistical analysis by the National Center for State Courts, the Michigan Judicial Workload Assessment, Final Report (August 2011), page 35, concluded that the number of district judges needed in the 29th Circuit is right dead even with the number of existing judgeships (2). The "implied need" for more or fewer district judgeships is 0.0. If there is "over-judging" in this circuit, it is at the circuit/probate level and NCSC's analysis places that "need" at "-1.4". What is before the Committee in SB 43 is perhaps what should have been before the Legislature in 2011-12.

However, while there is a similar appendix in the 2011 JRR, the JRR leaves off some important information that the NCSC Report includes – the extent to which the handling of judicial workload is dependent upon "quasi-judicial officers" or "QJOs" (referees, magistrates, and, yes, even law clerks). If a judgeship is eliminated in this Circuit, the NCSC analysis presumes that the workload of this Circuit cannot be handled without the addition of "1.2" quasi-judicial officers, who are appointed employees - at county expense.

continued

There are 3 issues that the Committee should be aware of when considering SB 43 and when the JRR for 2013-14 is released later this spring:

1. Article VI of the Michigan Constitution of 1963 retained the fundamental premise that judicial decisions are to be made by elected judges and justices. The 2011 JRR in a few circuits like the 29th (Gratiot/Clinton) would transfer judicial decision-making from elected officials to appointed employees.

2. There is a transfer of funding also – from a position (judge) paid by the state to one or more positions paid for by the county (or counties). That transfer, however, assumes that a QJO is created. If not, how will the caseload be handled?

3. The NCSC and JRR reports in 2011 noted that additional judgeships were needed. Given the financial situation of the state and local governments, the Supreme Court and SCAO chose not to do a secondary analysis for any the trial courts where "under-judging" was evident – but in so doing pulled their punches and begged a very important systemic question. If the Legislature were to eliminate all the "surplus" judgeships, who will decide the cases when the funding units decline to create judgeships that SCAO recommends? Given the difficulty over the last decade or so to create needed judgeships – notwithstanding SCAO recommendations and supporting data – this is not an idle inquiry. Caution may be advisable lest the state be left with insufficient judicial resources.

As to SB 43, the Senate-passed version is in my opinion a better option than current law and the original option of last Session. But it's not without ramifications that a future Legislature and SCAO may have to address.

Thank you for the opportunity to submit these remarks.

Respectfully,

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